

Appendix

DATE
1971

PROCEEDINGS

- Feb. 5 15. Filed defts. ANS to complaint.
- 5 16. Filed defts. notice of motion and motion for summary judgment, 2/25/71, 2 PM.
- 16 17. Filed plaintiffs notice of motion and motion summary judgment and opposition to defendants notice of motion and motion for summary judgment, 2/25/71, 2 PM.
- 25 18. Filed defendants opposition to plaintiffs cross-motion for sum judgment.
- 25 ORD after hearing, motions for summary judgment submitted.
- Mar. 31 19. Filed ORD granting declaratory judgment and Injunctive relief and dissenting opinion of Judge Conti. (Cys mailed) (Hamlin, Wollenberg).
- Apr. 7 20. Filed defendant's notice of appeal to Supreme Court.
- 7 21. Filed defendant's request for preparation, cert. and transmission of entire record to Supreme Court.
- 7 22. Filed defendant's motion to stay injunction pending appeal. Mailed Clerk's notice of appeal.
- 8 23. Filed plaintiffs opposition to motion to stay injunction pending appeal.
- 13 24. Filed stay of execution of order granting inj. relief. (Hamlin, Wollenberg & Conti)
- 13 Made, Mailed Record on Appeal to Supreme Court of the United States by Certified Mail Receipt No. 224326.
- 22 25. Filed STIP re record on Appeal.
- 26 26. Filed receipt from U.S. Supreme Court for record on appeal.

DATE
1971

PROCEEDINGS

- June 18 27. Filed letter from U.S. Supreme Court that case has been docketed, #1794.
- Aug. 9 28. Filed Supreme Court ORD: Stay of Inj. — Order granted by U.S.D.C. for Northern Calif. is vacated pending consideration of appeal now pending before this Court. In event jurisdiction is noted, this stay is to continue in effect; in event appeal is dismissed, this stay is to terminate automatically.

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Appendix

**INDIVIDUAL & CLASS ACTION FOR DECLARATORY
JUDGMENT AND INJUNCTION,
INJUNCTIVE RELIEF SOUGHT
(COMPLAINT)**

*In the United States District Court for the
Northern District of California*

CIVIL ACTION DOCKET NO. C-702273ACW

NANCY REMILLARD, etc., et al.

Plaintiffs,

VS.

ROBERT MARTIN, etc., et al.

Defendants.

THREE JUDGE COURT REQUESTED

INTRODUCTION

This is an action for injunctive relief authorized by 42 U.S.C. § 1983 to redress the deprivation of rights, privileges, and immunities secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, by the Social Security Act, 42 U.S.C. § 601-609, by the Civil Rights Acts, 42 U.S.C. § 1981-1994. This is also a suit for a declaratory judgment pursuant to 28 U.S.C. § 2201, and for the return of money illegally withheld.

JURISDICTION

1. Jurisdiction of this Court is invoked under 28 U.S.C. § 1343(3). Plaintiff also invoke the pendent jurisdiction of this Court.

2. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. § 2281 in that it seeks an injunction to restrain the defendant officers and employees of the State of California from enforcing or executing a state Aid to Families with Dependent Children (AFDC) regulation on the grounds that the regulation is invalid under the Constitution of the United States. The regulation prohibits the payment of AFDC benefits to the families of servicemen on the basis of the "continued absence" of the serviceman from his home.

3. Plaintiffs seek a Declaratory Judgment pursuant to 28 U.S.C. §§ 2201 and 2202 that to exclude the families of servicemen from AFDC benefits on the ground that the husband and father, although physically separated from his family, is not "continually absent from the home" violates the Equal Protection, Due Process, and Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constiution; violates 42 U.S.C. §§ 602 (a) (10), 606 (a), 1981-1983, and California Welfare and Institution Code section 11250.

PARTIES

4. Plaintiff Nancy Remillard is, and at all relevant times has been, the parent and general guardian of the following minor plaintiff:

Name	Age	Date of Birth
Karen Marie	1½	January 14, 1969

These plaintiffs are citizens of the United States and residents of the State of California residing in the City of San

Pablo, County of Contra Costa. Mrs. Remillard is the person lawfully entitled to receive and administer AFDC payments under the Social Security Act upon satisfying valid state regulations. She sues on behalf of said child and in her own rights.

5. Plaintiffs bring this action on their own behalf and on behalf of all other similarly situated, pursuant to Rule 23 (b) (2) of the Federal Rules of Civil Procedure. The class is so numerous that joinder of all members is impracticable and plaintiffs can fairly and adequately protect the interest of the class. There are questions of law and fact common to the class and their claims and defenses are the same. The defendants have acted on grounds generally applicable to this class, making appropriate injunctive and declaratory relief with respect to the class as a whole.

6. The plaintiffs represent a class of mothers and children, residents of the State of California, who have applied for payments under the AFDC program, who are otherwise entitled to such payments, but who have been denied such payments due to a regulation of the defendants that the absence of a father for military service does not constitute "continued absence from the home" which is required by the Social Security Act as an eligibility factor.

7. The named defendants are: Robert Martin, Director of the California State Department of Social Welfare; under California Welfare and Institutions Code Sections 10553 and 10554 he is responsible for the management of the California Department of Social Welfare and is the only person authorized to adopt regulations, orders, or standards of general application and implement, interpret or make specific the law enforced by the California Department of Social Welfare; the State Department of Social Welfare is, under W & I Code §§ 10600, 10603 and 10604 the single state agency with full power to supervise the

Aid to Families with Dependent Children Program and establish regulations not in conflict with the law for the administration of the program; Robert Jornlin, Director of the Contra Costa County Department of Social Services; under California W & I Code §§ 10802 and 10803 he is charged with the administration of the Aid to Families with Dependent Children Program in Contra Costa County; Lois Lee, Social Worker Supervisor, Contra Costa County Department of Social Services; Susan Giordano, Social Worker, Contra Costa County Department of Social Services; Helen Kornguth, Eligibility Worker, Contra Costa County Department of Social Services; John Gibson, Social Worker Supervisor, Contra Costa County Department of Social Services; defendants are sued in their capacities as agents and employees of the State of California.

THE AFDC PROGRAM

8. California participates in the Federal Government's AFDC program, which was established by the Social Security Act of 1935. The Act's purpose is to aid needy children who have been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent.

9. The State of California, in order to receive Federal funds for the AFDC program, is required to submit a plan to the Secretary of Health, Education and Welfare (HEW). The plan must conform to the Social Security Act, to regulations promulgated by HEW, and to the Constitution of the United States.

DEFENDANTS WRONGFUL ACTS

10. It is the policy of the defendants, once a child is determined to be "needy", to then determine whether or not the child is "deprived of parental support or care."

The defendants policy declares that needy children are "deprived of parental support or care" when a parent is dead or when a parent is disabled from employment. Further, their policy considers children "deprived of parental support of care" when there is "continued absence" of a parent from the home. For example, needy children are eligible on the basis of continued absence when—

- a. a parent is incarcerated;
- b. a parent is confined, for example in a mental institution;
- c. a parent has been deported;
- d. a parent has deserted;
- e. a parent has been divorced or separated from another parent;

11. The purpose of these provisions is plain: to aid needy children where an individual, usually the father, who owes them a duty of support, is (a) continuously absent from the home, and (b) unable or unwilling to meet his duty of support.

12. The father of the plaintiff Remillard child is Gregory Remillard. On May 31, 1969 he enlisted in the United States Army. In March, 1970 he reenlisted for five years. He was stationed in Fort Lewis, Washington for eighteen weeks. He was then sent to Fort Hood, Texas where he was stationed until May, 1970. On July 2, 1970 he was sent to Vietnam where he is now stationed and where he will remain until reassigned by the United States Army in July, 1971.

13. Claimant Nancy Remillard first applied with Contra Costa County Department of Social Services for AFDC benefits on or about December 16, 1969. At that time claimant was denied AFDC benefits by defendants Susan Giordano and Lois Lee on the basis of State Department of Social Welfare Manual Section 42-350.1 which read:

"Continued absence from the home exists if the parents are living separate and apart, and the parents are separated without legal action, or a parent has deserted, and a clear dissociation of one or both parents from the normal family relationship exists."

On or about September 10, 1970 claimant NANCY REMILLARD again applied with Contra Costa County Department of Social Services for AFDC benefits. At that time Plaintiff was denied AFDC benefits by defendants Helen Kornguth and John Gibson on the basis of Social Welfare Manual Section 42 350 which was amended, effective February 9, 1970 to read, in part, as follows:

1. *Definition of "Continued Absence"*

"Continued absence" exists when the natural parent is physically absent from the home and the nature of the absence constitutes dissociation, that is, a substantial severance of marital and family ties that deprives the child of at least one of its natural parents.

A substantial severance of marital and family ties means that the absence is accompanied by a definite interruption of or marked reduction in marital and family responsibilities and relationships compared to previously existing conditions.

"Continued absence" does not exist:

11 When one parent is physically absent from the home on a temporary basis. Examples are visits, trips made in connection with current or prospective employment, active duty in the Armed Services.

14. Nancy Remillard and Karen Marie Remillard are now in desperate need. Until September, 1970 they received an allotment check in the amount of \$130.60 per month. During September and October, 1970 they received no allotment. In September, 1970 the Contra Costa County Department of Social Services gave the Remillard Family \$41.00

from their General Assistance Fund and the American Red Cross gave the family \$89.00. On or about October 5, 1970 Mrs. Hoffman, Social Worker Supervisor, Contra Costa County Department of Social Services notified the Red Cross that said Department would not give Mrs. Remillard any more money. At that time the Red Cross loaned Mrs. Remillard \$130.60. The California Department of Social Welfare estimates the amount necessary to maintain a family with one adult female and one infant to be \$111.00 plus the cost of housing. Mrs. Remillard pays \$30.00 per month for low-income housing.

15. The defendants, acting under California Welfare and institutions Code sections 11250, 10553, 10554, and 10604 have adopted and implemented the "continued absence from the home" regulation which excludes from its coverage the absence of fathers due to military service.

16. At all relevant times herein the defendants have been acting under color of state law.

FIRST CAUSE OF ACTION

17. The "continued absence from the home" regulation deprives plaintiffs of the equal protection of the law; in that it discriminates without any valid legislative purpose against needy children whose fathers are in the Armed Services and who are thus absent from the home due to military service and in favor of needy children whose fathers are absent from the home for other reasons.

SECOND CAUSE OF ACTION

18. The plaintiffs refer to Paragraphs 1-16 inclusive and incorporate the same herein by reference as if set out at length.

19. The "Continued absence from the home" regulation violates the Due Process and Privileges and Immunities

Clauses of the Fourteenth Amendment to the United States Constitution, in that: the regulation embodies a conclusive presumption that a father who has enlisted in the armed forces is not continuously absent from the home, which presumption is arbitrary, capricious, and irrational; which presumption further has the effect of burdening needy families on the basis of the father's performance of a federal duty of serving his country in the armed forces; and which presumption further has the effect of burdening needy children on the basis of their father's legal status, over which they have no control.

THIRD CAUSE OF ACTION

20. The plaintiffs refer to Paragraphs 1-16 inclusive and incorporate the same herein by reference as if set out at length.

21. The "Continued absence from the home" regulation deprives the plaintiffs of rights protected by the Social Security Act, in that: it defines "continued absence from the home" in a way inconsistent with 42 U.S.C. § 606 (a) and federal regulations promulgated thereunder by HEW. By promulgating a regulation inconsistent with § 606 (a), the Defendants have breached the obligation imposed by 42 U.S.C. 602 (a) (10) of the Act that AFDC "shall be furnished with reasonable promptness to all eligible individuals."

FOURTH CAUSE OF ACTION

22. The plaintiffs refer to Paragraphs 1-16 inclusive and incorporate the same herein by reference as if set out at length.

23. The "continued absence from the home" regulation violates California W & I Code §§ 11250 and 10604 in that: it defines that term in a way inconsistent with § 406 (a) of the Social Security Act and federal regulations promulgated thereunder by HEW.

THE INJURY TO PLAINTIFFS

24. Plaintiffs are now suffering and will continue to suffer irreparable injury and deprivation of the essentials of human existence by reason of their being excluded from AFDC payments and coverage under the California Medical program. They have immediate and dire need of the moneys to which they are entitled by federal law. Without them, they will be unable to adequately feed, clothe, and shelter themselves during the pendency of this action.

25. Plaintiffs have no plain, adequate or speedy remedy at law to obtain such payments and the suit for injunctive relief is their only means of securing such relief.

26. The action of the defendants has already deprived the plaintiffs of payments to which they were entitled for December 1969 through October 1970, for which they applied and were refused. Unless enjoined, the defendants will continue to deprive the plaintiffs of the money to which they are entitled in the month of November, 1970, and each and every month thereafter and will inflict irreparable injury upon them.

27. There is an actual controversy now existing between the parties to this action as to which plaintiffs seek the judgment of this court. Plaintiffs seek, pursuant to 28 U.S.C. §§ 2201, 2202 a declaration of the legal rights and relations in the subject matter in controversy.

PRAYER

WHEREFORE, plaintiffs respectfully pray this Court:

1. to convene a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284, to determine this controversy;
2. to order that the action may be maintained as a class action;

Plaintiffs respectfully pray the three-judge court when convened:

3. to enjoin the defendants from continuing to withhold AFDC payments from the plaintiff class on the grounds that they are not deprived of parental support or care by reason of the absence of their fathers in the United States Army;

4. to enter a declaratory judgment that the policy of excluding the children of servicemen from AFDC benefits on the grounds that they are not deprived of parental support or care by the continued absence of a parent, now sanctioned by State Department of Social Welfare Manual 42-350, violates the Equal Protection, Due Process, and Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution; violates the Social Security Act, 42, U.S.C. §§ 602 (a) (10), 606 (a); violates California W & I Code 11250.

5. to order the defendants to release AFDC payments illegally withheld from members of the class from the date of their incorrect action;

6. to grant such other relief as may be just and proper.

Dated: _____, 1970.

CONTRA COSTA LEGAL SERVICES
FOUNDATION

CARMEN L. MASSEY

[Affidavit of Service omitted in printing.]

MOTION FOR TEMPORARY RESTRAINING ORDER

*In the United States District Court for the
Northern District of California*

[Title omitted in Printing]

No. C-70 2273 ACW

**MOTION FOR TEMPORARY
RESTRAINING ORDER**

Upon the complaint and other pleadings filed in this case and the affidavits filed in support of this motion, plaintiff moves this honorable court for a temporary restraining order enjoining defendants, their successors in office, agents and employees from withholding AFDC benefits from plaintiff on the grounds the service of her husband in the Armed Services does not constitute "continuous absence" from her home.

The plaintiff further shows to this honorable court:

(1) In this action plaintiff has moved for a preliminary injunction to enjoin defendants from denying AFDC benefits on the basis that the absence of a parent from the home due to his service in the Armed Forces does not constitute "continued absence."

(2) Plaintiff is a needy family within the definition of the California State Department of Social Welfare so as to make her otherwise eligible for AFDC benefits.

(3) Plaintiff has according to California Department of Social Welfare Standards, been existing at a below subsistence level since December, 1969. As of November, 1970, to the best of her knowledge she will have no money for the subsistence of herself and her child.

(5) Plaintiff's affidavit filed in this matter makes it clear that unless benefits are resolved immediately she and

her family will not be able to purchase the basic necessities of life. There is simply no way to avoid irreparable injury short of granting to her the AFDC benefits to which she is entitled.

Respectfully submitted,

CONTRA COSTA LEGAL
SERVICES FOUNDATION
CARMEN L. MASSEY

[Brief in Support of Motion omitted in printing]

AFFIDAVIT

[Title omitted in Printing]

AFFIDAVIT**[IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER]**

I, NANCY REMILLARD, the undersigned, having been duly sworn, do depose and state that:

On May 31, 1969 my husband, GREGORY REMILLARD, enlisted in the United States Army. At that time the Contra Costa County Department of Social Services gave me AFDC benefits in the amount of \$148.00 per month for approximately two months. In August or September of 1969, I began receiving an allotment in the amount of \$130.60 for the support of myself and my minor child. I notified the Department of Social Services of this allotment and I was informed that I was no longer eligible for AFDC benefits.

The California State Department of Social Welfare has published a AFDC Cost Schedule For Family Budget Units which states that a family of my composition living in Contra Costa County needs a minimum of \$111.00 plus the cost of housing in order to exist at a safe, decent standard. I live in low-income housing which costs me \$30.00 per month. This means that I need a minimum of \$141.00 per month to cover my basic needs.

As my allotment of \$130.60 was insufficient to cover the cost of my basic needs, I reapplied for AFDC benefits in December, 1969. At that time I was told I was ineligible for AFDC benefits because my husband was in the Armed Forces.

In September, 1970 my allotment was stopped. The Red Cross has been working on my case to get my allotment back, but they cannot tell me when or if I will get my allotment. In the meantime, the County of Contra Costa has given me \$41.00 from their General Assistance fund and the Red Cross has given me \$89.00 and loaned me \$130.60 but neither source will be able to give me any more money.

Every month I have at least the following expenses:

Rent	\$ 30.00
Utilities	10.00
Telephone	8.00
Laundry	10.00
Car	25.00
Gas	10.00
Clothes	10.00
Food	50.00
	<hr/>
	\$153.00

In addition, I sometimes have emergency expenses such as repairs of appliances. If I do not pay my rent, I will be evicted and I will not be able to find any other housing that is so cheap. If I do not make the payments on my car, it will be repossessed and I will have no means to take my child to the doctor or to do my shopping.

I have no source of income other than my allotment which I have not received for two months. My parents are unable to give me any financial help and I have no relative or friends who are able to give or loan me money.

I declare under perjury that the foregoing is true and correct.

NANCY REMILLARD

[Notarization omitted in printing]

MOTION FOR A PRELIMINARY INJUNCTION

*In the United States District Court for the
Northern District of California*

No. C-70 2273 ACW

[Title omitted in Printing]

[NOTICE OF MOTION OMITTED IN PRINTING]

Upon the Complaint and other pleadings filed in this case and the affidavits filed in support of this motion, plaintiff moves this honorable court for a preliminary injunction:

(a) Enjoining defendants, their successors in office, agents and employees from denying AFDC benefits to plaintiff and the classes she represents on the grounds that the absence of a parent from the home due to service in the Armed Services does not constitute "continuous absence".

(b) Ordering defendant to immediately restore to plaintiffs and the class they represent all AFDC benefits that have been withheld from them on the basis of State Department of Social Welfare Manual Section 42-350 from the time such benefits have been so withheld.

Plaintiff further prays that this court will allow her costs and grant such other and further relief as may be equitable, just, and proper.

Respectfully submitted,

CONTRA COSTA LEGAL
SERVICES FOUNDATION
CARMEN L. MASSEY
Attorney for Plaintiff

**BRIEF IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

*In the United States District Court for the
Northern District of California*

No. C-70 2273 ACW

[Title omitted in Printing]

**BRIEF IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION****INTRODUCTION**

This case involves the question of whether California may lawfully or constitutionally refuse to grant Aid to Families with Dependent Children (AFDC) benefits to needy families where the absence of a parent is due to his military service. This case does not involve the question whether plaintiff's family is needy as the family clearly falls within California's definition of what constitutes a needy family.

CALIFORNIA'S REFUSAL TO GRANT AFDC BENEFITS WHERE FATHER OF NEEDY CHILD IS ABSENT FROM THE FAMILY DUE TO HIS SERVICE IN THE ARMED SERVICES VIOLATES THE FEDERAL SOCIAL SECURITY ACT.

The categorical public assistance program of Aid to Families with Dependent Children operates through a federal grant-in-aid mechanism being financed largely by the federal government and administered by the states. States have no obligation to participate in the AFDC program, but if they do, they are required to administer their programs in accordance with the definitions, conditions, and statutory purposes set forth in Title IV, Part A of the Social Security Act, 42 U.S.C. §§ 601-610. *King v. Smith* 392 U.S. 309, 316-317 (1968). As the Court in *King* said:

"There is, of course, no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the State shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid." 392 U.S. at 333, Note 34 (citations omitted)

42 U.S.C. 606(a) defines the term "dependent child" as a needy child who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent" and who is living with certain specified relatives and who fulfills certain age requirements.

42 U.S.C. 602 (a)(10) provides that a State plan for aid and services to needy families with children must "provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."

In this case we are concerned with that particular part of 42 U.S.C. 606(a) which provides that a child is "dependent" if he has been deprived of parental support or care due to the "continued absence from the home" of a parent. There is no question but that the plaintiffs in this case are needy. The sole question is whether or not there is "continuous absence from the home" of such parent, such as to qualify plaintiffs for AFDC benefits.

The HEW Handbook of Public Assistance Administration, Part 4, Section 3422 provides:

3422. *Continued Absence of the Parent From the Home*

3422.2 *Interpretation.*—Continued absence of the parent from the home constitutes the reason for depriva-

tion of parental support or care under the following circumstances;

1. When the parent is out of the home;
2. When the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support or care of the child. For example: The child's father has left home, without forewarning his family, and the mother really does not know why he left home, nor when or whether he will return.

Within this interpretation of continued absence the State agency in developing its policy will find it necessary to give consideration to such situations as divorce, pending divorce, desertion, informal or legal separation hospitalization for medical or psychiatric care, search for employment, employment away from home, *service in the armed forces or military service*, and imprisonment.

3422.4 *Federal Financial Participation*.—Federal participation can be claimed when the fact of absence has been established and the effect of this absence is to deprive the child of support or care.

Upon the return of a parent whose children have been receiving aid to dependent children, Federal participation will be available for payments made for a temporary period during which the effects of

the absence are still continuing, as that period of "continuing effects" is defined under State agency instructions.

In regards to the particular question posed in this case; Mr. Jules H. Berman, Chief, Division of Program Payment Standards in the Department of Health, Education and Welfare, has more specifically stated:

Absence in military service is considered as "continued absence." Federal financial participation is thus available for AFDC payments for otherwise eligible children whose father is absent from the home in military service."

A copy of this written statement is attached to this brief and marked Exhibit "A."

Section 11250 of the California Welfare & Institutions Code provides

"Aid, Services, or both shall be granted under the provision of this chapter, and subject to the regulations of the department to families with related children under the age of 18 years, except as provided in Section 11253 (having to do with children over 16) in need thereof because they have been deprived of parental support or care due to: (b) The divorce, separation or desertion of a parent or parents and resultant continued absence of a parent from the home for these or other reasons."

Yet, allegedly acting under sections §§ 10553 and 10554 of the California Welfare & Institution Code, the Director of the California State Department of Social Welfare has adopted regulations which, prior to February 9, 1970, were interpreted to prevent payment of AFDC benefits to families in which the absence of a parent is based upon his military service, and which, effective February 9, 1970, specifically excluded such payments. Copies of these rules are attached hereto and marked Exhibit "B" and Exhibit "C".

The state is not free to impose additional restrictions on the receipt of AFDC benefits. (*King v. Smith*, *supra*) The state is not free to define "continued absence" in a manner inconsistent with the federal act and HEW regulations. In *Damico v. California*, No. 46538, N. D. California, (September 12, 1969), this court decided that California Welfare regulations which stated there was no "continued absence" due to separation unless the applicant had either filed a legal action or the separation had lasted three months were in conflict with 42 U.S.C. 606 (a) and the primary purposes of the AFDC Program. A similar result was reached in *Doe v. Hursh*, Civ. No. 4-69-403 (D. Minn, June 30, 1970).

See also *Doe v. Shapiro*, 302 F. Supp. 761, (D. Conn 1969), *Appeal Dismissed* 396 U.S. 488 (1970) in which the court held the state cannot condition receipt of AFDC upon a parent's naming the putative father of an illegitimate child. Section 42-350 of the California State Department of Social Welfare manual has no more validity than did the regulation in *Damico*. Like the "90 day rule" involved in that case, Section 42-350 is an impermissible restriction on the availability of AFDC benefits to needy families in California. While the federal definition requires only "continued absence from the home California's definition requires that the absence be for other reasons than military service. It should be noted that the military service exception cannot be viewed as a general exclusion from eligibility of families in which parental absence is voluntary, since eligibility is granted in cases of voluntary absence due to separation, divorce, or desertion. Nor may the exception be viewed as a general exclusion of cases in which the absent parent's intent is to return to his family at some later date, since such intent may well be present in cases in which eligibility is granted on the basis of incarceration, confinement, mutual separation or desertion. Nor may the

exception be viewed as a general exclusion of cases in which the absence is for a set time as opposed to an unknown time as eligibility is granted in cases where a parent is in jail for a particular period of time. The military service cases are probably closest to those cases in which a parent is absent from the home due to incarceration. In both cases the family may be "psychologically intact," and there may be an "intent to return to the home after a set period," and there may be an impossibility of the family living together due to governmental action. If plaintiff's husband were serving a year long jail sentence, she would be eligible for AFDC. Because he is spending a year serving in the Armed Forces in Vietnam, she is not so eligible.

Just as California's military service exemption finds no counterpart in the language of the Social Security Act, there is nothing in its legislative history to indicate that when Congress said "continued absence from the home" it meant "continued absence from the home except by virtue of military service." President Roosevelt, in recommending the permanent entry of the federal government into the field of public assistance, referred to "children deprived of a father's support" as those who should be aided by a federal grant-in-aid program. Message of the President Recommending Legislation on Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Sess. 29 (1935). Similarly the House Committee on Ways and Means referred in general terms to the beneficiaries of Title IV as "those [children] in families lacking a father's support," H.R. Rep. No. 615, 74th Cong., 1st Sess. 10 (1935), and the Senate Committee on Finance made reference to "children in families which have been deprived of a father's support." S. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935). (The Senate Committee went on to note that "These are principally families with female heads who are widowed, divorced, or deserted," *id.*,

but neither stated or implied that eligibility by virtue of parental absence was to be limited to cases of divorce or desertion.)

The result is very simple:

"Under the Social Security Act, a child is eligible for and entitled to AFDC assistance if he is both 'needy' and 'dependent.' . . . A child is 'dependent' if a parent is continually absent from the home." *Doe v. Shapiro*; supra at 764.

"While [the state] is free to set its own standard of need and to determine the level of benefits, once a child is found to be without a parent and in need, he is eligible for AFDC benefits." *Doe v. Hursh*, supra.

California's military service exception has the effect of carving out a group of children who come within the federal definition of "dependent child" set forth in 42 U.S.C. 606(a) and denying them eligibility for AFDC benefits because of something their father has done, i.e. become a member of the Armed Services. "The protection of such (dependent) children is the paramount goal of AFDC." *King v. Smith*, 392 U.S. at 325. Regulations must be analyzed in light of that paramount goal. The question of deprivation "must focus on the child, not on the legal status of the parents." *Damico v. California*, supra. In this case, Karen Marie Remillard has been deprived of the presence of her father for over a year. This deprivation will continue at least until July, 1971. Surely, it matters not to her why her father is gone; the only relevant factor is that he is "continuously absent."

In *King v. Smith*, supra, the Court did not treat the federal eligibility definition as representing only the outer limits of federal financial participation. Rather, the Court was concerned with defining that group of individuals that Congress intended the Federal Act to cover, the resulting

conclusion being that all those within that group must be granted eligibility by the state. The *King* rationale—that state-imposed definitions and eligibility requirements inconsistent with 42 U.S.C. 606(a) are invalid as a violation of the requirement of 42 U.S.C.(a)(10)—has been followed by a number of district courts. *Doe v. Shapiro*, supra.; *Cooper v. Laupheimer*, Civ. No. 69-2421 (E.D.Pa., April 16, 1970); *Evans v. Houston*, No. 7013 (Mich. Ct. Apls., March 25, 1970); *Doe v. Hursh*, supra. That rationale is inescapably applicable here; California's military service exception is equally as inconsistent with the absent parent component of 42 U.S.C. 606(a) as was Alabama's "substitute father regulation" in the *King* case and thus is equally violative of the mandate of 42 U.S.C. 602(a)(10) that AFDC "be furnished with reasonable promptness to all eligible individuals."

**CALIFORNIA'S DENIAL OF ELIGIBILITY FOR AFDC
TO OTHERWISE ELIGIBLE CHILDREN WHOSE
FATHERS ARE SERVING IN THE ARMED
FORCES VIOLATES THE EQUAL PROTECTION
CLAUSE OF THE FOURTEENTH AMENDMENT**

The effect of California's military service exception is to create two classes of needy families indistinguishable from each other except that one is composed of families in which the father is absent by virtue of his service in the Armed Forces, and the other is composed of families in which paternal absence stems from some other reason. Solely on the basis of this difference, the first class is denied and the second class is granted "welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life." *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969). Unless there is, at least, some rational reason to support this

classification, it must fall as a violation of the Equal Protection clause of the United States Constitution.¹

It is difficult to imagine what basis the state could have denying assistance to the needy families of absent servicemen when it grants that same assistance to the needy families of prisoners and deportees. If the reason is to discourage service in the military when the absence from the home and the reduction in income would render the family incapable of meeting their needs as defined by Public Assistance standards, then the action is patently invalid as being overbroad in that the California regulation not only prohibits payments to needy families of absent enlistees, but also payments to needy families of draftees.

However, Plaintiff argues that the state may not constitutionally inhibit military service that is entered by any means. While it is not specifically spelled out in the Constitution that there is a right to military service, it has long been judicially recognized as self-evident that

"the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need . . ."

The Selective Service Draft Law Cases 245 U.S. 366, 375 (1918)

The obligation of service being a necessary correlative of citizenship, the right to fulfill that obligation voluntarily must be equally inherent in citizenship.

The right to military service is similar to the right to travel which also is not mentioned directly in the Constitution, but which has been recognized as "a right so elementary [it] was conceived from the beginning to be a neces-

1. It will be shown that, whether one uses the "rational basis test" or the "compelling state interest test," the discrimination must fall.

sary concomitant of the stronger Union the Constitution created." *United States v. Guest*, 383 U.S. 745, 757-758; quoted in *Shapiro v. Thompson*, *supra*, at 630-631. The right to serve in the Armed Forces of one's native country is equally "a right so elementary" and a concomitant not only "of the stronger Union the Constitution created," but of nationhood itself.

In *Shapiro v. Thompson*, *supra*, which case invalidated waiting-period requirements for welfare benefits, the Court said:

"... even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause." (638)

See also *Skinner v. Oklahoma* 316 U.S. 535, 62 S. Ct. 1110 (1942) (right to procreate); *Levy v. Louisiana* 391 U.S. 68 (1968) (right to recover for wrongful death); *Rinaldi v. Yeager*, 384 U.S. 305 (1966) (right of appeal); *Carrington v. Rash* 380 U.S. 89 (1965) (right of servicemen to vote).

If California's classification is based upon its desire to protect its treasury, this likewise is not sufficient basis for denying benefits to needy families of absent servicemen. As was said in *Shapiro v. Thompson*, *supra*:

"We recognize that a State has a valid interest in preserving the fiscal integrity of its program. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other

program. But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens . . . in the cases before us appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious discrimination." (633)

The Supreme Court's most recent statement on the relation of the equal protection clause to welfare benefits is *Dandridge v. Williams* 397 U.S. 471. In that case the Court held that a maximum family allowance to recipients of AFDC did not violate the Equal Protection clause even though children in large families received less AFDC money than children in small families. That case, however, is easily distinguishable from the present case. In that case the Court differentiated previous equal protection cases by stating: "here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment *only* because the regulation results in some disparity in grants of welfare payments to the largest AFDC families."

In this case it is claimed the California regulation imposes also on the right to military service. *Dandridge* in no way changed the holding of *Shapiro*, supra, that where basic rights are involved, the state must justify the discrimination by showing a compelling state interest. (See *Dandridge*, Note 16)

It should also be noted that, in the *Dandridge* case, every family was receiving *some* money, whereas, in this case, Plaintiff's family has been *completely* excluded from AFDC benefits.

Even if this court were to hold that only the "rational basis test" applies in this case, it is submitted that there

is no rational basis for excluding needy families of absent military men from AFDC benefits. As was stated earlier in this brief, this discrimination may not be justified on the basis the absence of the father is "voluntary" as the regulation applies to draftees as well as enlistees and aid is granted where the absence is voluntary due to divorce or separation; on the ground the family is "psychologically intact" as this may often be true in cases where the husband is in jail, in an institution, or has been deported; on the basis the absence is not "continued" as military service is frequently of longer duration than a jail term, a period of commitment or a separation; or on the ground the family could live with the absent parent if it so chose as Plaintiff is not free to join her husband who is in a War Zone.

Applying either test, California's regulation denying AFDC benefits to needy families of absent servicemen should be found violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

**CALIFORNIA'S DENIAL OF ELIGIBILITY FOR AFDC
TO OTHERWISE ELIGIBLE CHILDREN WHOSE
FATHERS ARE SERVING IN THE ARMED
FORCES VIOLATES THE DUE PROCESS AND
PRIVILEGES AND IMMUNITIES CLAUSES OF
THE FOURTEENTH AMENDMENT**

As outlined in the section on equal protection, it can scarcely be denied that the right to serve in the Armed Services is inherent in national citizenship. This is not to imply that the Armed Services must allow every volunteer to serve, regardless of age, health or the needs of the nation, but rather to state that the right to military service is a privilege and immunity secured by national citizenship which cannot be infringed upon by the states.

In *Crandall v. State of Nevada* 6 Wall. 35, 18 L. Ed. 744, the majority opinion stated:

"The people of these United States constitute one nation . . . This government has necessarily a capital established by law . . . That government has a right 'to call to this point any or all of its citizens to aid in its service . . . it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established.'" 6 Wall at 43-44.

In *In re Siem*, 284 F. 868, 869 (D. Mont. 1922) the Court stated:

"The distinguishing and supreme obligation of citizenship and its permanent allegiance is military service. It has its antecedents in the feudal system wherein the vassal makes oath of fealty to his lord and services him in war, as a consideration and payment for the land and protection he receives from his lord. So the citizen . . . likewise renders military service to the country in payment of and consideration for the advantages, rights and protection it extends to him."

In *Edwards v. California*, 314 U.S. 160, 185 (1941), Mr. Justice Jackson, in his concurring opinion, stated: "Rich or penniless, [Duncan's] citizenship under the Constitution pledges his strength to the defense of California as part of the United States . . ."

Any law that clearly impinges upon a fundamental right must be shown to reflect a *compelling* governmental interest or it must fall under the Due Process Clause of the Fourteenth Amendment. *Shapiro v. Thompson*, 394 U.S. at 644. "[T]o justify the deterrent effect . . . on the free exercise . . . of their constitutionally protected rights . . . a . . . subordinating interest of the State must be compelling.

NAACP v. Alabama 357 U.S. 449, 463, 78 S. Ct. 1163, 1172.

Furthermore, the California regulation in question here is a denial of due process in that it embodies a conclusive presumption that a father who is absent from the home due to his military service is not continuously absent from the home, which presumption is arbitrary, capricious, and irrational. Plaintiff is prepared to offer evidence that her husband is continuously absent from the home so as to qualify her for AFDC benefits. To deny her the right to basic subsistence because of California's rule that her husband is not continuously absent because he is absent due to military service constitutes a denial of due process as guaranteed by the Fourteenth Amendment.

Respectfully submitted

CONTRA COSTA LEGAL SERVICES
FOUNDATION

By CARMEN L. MASSEY
Attorney for Plaintiff

EXHIBIT A

DEPARTMENT OF HEALTH, EDUCATION AND
WELFARE [Letterhead]

March 30, 1970

Mr. Michael Weiss
Staff Attorney
Center on Social Welfare Policy & Law
401 West 117th Street
New York, New York 10027

Dear Mr. Weiss:

In your letter of March 18, you asked about Federal policy considering a parent's absence for military service as constituting continued absence for AFDC purposes.

Absence in military service is considered as "continued absence." Federal financial participation is thus available for AFDC payments made for otherwise eligible children whose father is absent from the home in military service.

The essential elements in determination of a parent's continued absence are that the parent be out of the home and the absence interrupts or terminates his "functioning as a provider of maintenance, physical care, or guidance for the child." The Federal policy is contained in the Handbook of Public Assistance Administration, Part IV. section 3420.

Sincerely yours,

/s/ JULES H. BERMAN
Chief, Division of Program
Payment Standards

EXHIBIT B

*State Department of Social Welfare Manual**Section 42-350.1*

(effective until February 8, 1970)

Continued absence from the home exists if the parents are living separate and apart, and the parents are separated without legal action, or a parents has deserted, and a clear dissociation of one or both parents from the normal family relationship exists.

EXHIBIT C

SPECIAL ELIGIBILITY

CALIFORNIA-SDSW-MANUAL-EAS

Regulations

DEPRIVATION OF PARENTAL SUPPORT OR CARE

AFDC

42-350 CONTINUED ABSENCE OF A PARENT

.1 *Definition of "Continued Absence"*

"Continued absence" exists when the natural parent is physically absent from the home and the nature of the absence constitutes dissociation, that is, a substantial severance of marital and family ties that deprives the child of at least one of its natural parents.

A substantial severance of marital and family ties means that the absence is accompanied by a definite interruption of or marked reduction in marital and family responsibilities and relationships compared to previously existing conditions.

"Continued absence" does not exist:

- .11 When one parent is physically absent from the home on a temporary basis. Examples are visits,

trips made in connection with current or prospective employment, active duty in the Armed Services.

- .12 When both parents are maintaining a home together but the child lives elsewhere. It is immaterial whether the child lives with a relative or in foster care as a result of placement by the parents, by an agency acting on behalf of the parents, or by an authoritative agency.

.2 Circumstances That Meet the Definition of "Continued Absence"

The physical absence of a parent from the home in conjunction with any one of the following circumstances shall be considered to meet the definition of "continued absence":

- .21 The parents are not married to each other and have not maintained a home together.

.22 The parent

.221 Is not legally able to return to the home because of confinement in a penal or correctional institution, or

.222 Has been deported, or

.223 Has voluntarily left the country because of the threat of, or the knowledge that he or she is subject to deportation.

- .23 A parent has filed, or retained legal counsel for the purpose of filing an action for dissolution of marriage, for a judgment of nullity, or for legal separation.

- .24 The court has issued an injunction forbidding the parent to visit the spouse or child.

- 25 The remaining parent has presented a signed, written statement that the other parent has left the family and that dissociation within the definition of "continued absence" exists.
- 26 Both parents are physically out of the home and their whereabouts are not known.

[Statement of Service omitted in printing]

TEMPORARY RESTRAINING ORDER

*In the United States District Court for the
Northern District of California*

No. C-70 2273 ACW

NANCY REMILLARD, et al.

Plaintiff,

vs.

ROBERT MARTIN, et al.

TEMPORARY RESTRAINING ORDER

Having considered the above motion for a Temporary Restraining Order, the Affidavit filed herein and the Complaint and other pleadings filed in this action and in order to prevent serious irreparable injury to plaintiff:

It Is Hereby Ordered that defendants, their Successors in Office, agents and employees are restrained from denying AFDC benefits to plaintiffs Nancy Remillard and Karen Marie Remillard on the basis the absence of Gregory Remillard from the home does not constitute "continuous absence".

It Is Further Ordered that the motion for a preliminary injunction in this matter shall be heard 20 Nov. 1970 at 9:30 m, or as soon thereafter as counsel may be heard and shall be noticed no later than 1 Nov. 1970.

Plaintiff's pleadings, affidavits, and briefs in this matter and the notice for a preliminary injunction shall be submitted to opposing counsel and the court by 1 Nov. 1970. Defendants' opposition counter affidavits and briefs, if any, shall be submitted to opposing counsel and the court by 10 Nov., 1970. Plaintiff's reply briefs, if any, shall be submitted to the court opposing counsel by 15 Nov. 1970.

Plaintiff shall serve this temporary Restraining Order no later than 1 Nov., 1970:

Dated at San Francisco California this 22nd day of Oct., 1970 ato'clock.

/s/ ALBERT C. WOLLENBERG
U. S. District Judge

MOTION FOR TEMPORARY RESTRAINING ORDER

*In the United States District Court for the
Northern District of California*

[Title Omitted in Printing.]

**CIVIL ACTION NO. C-70 2273
MOTION FOR TEMPORARY
RESTRAINING ORDER**

Upon the complaint and other pleadings filed in this case and the affidavit filed in support of this motion, plaintiff Joyce Faye Dones moves this honorable court for an extension of the temporary restraining order granted in this case to Nancy Remillard enjoining defendants, Robert Martin and Robert Jornlin, their successors in office, agents and employees from withholding AFDC benefits from plaintiff on the grounds the service of her husband in the Armed Services does not constitute "continuous absence" from her home to Joyce Faye Dones and her family.

The plaintiff further shows to this honorable court:

(1) In this action plaintiff, Nancy Remillard, has moved for a preliminary injunction to enjoin defendants from denying AFDC benefits on the basis that the absence of a parent from the home due to his service in the Armed Forces does not constitute "continued absence."

(2) Plaintiff Joyce Faye Dones and her children are a needy family within the definition of the California State Department of Social Welfare so as to make her otherwise eligible for AFDC benefits and members of the class represented by Nancy Remillard.

(3) Plaintiff and her children have, according to California Department of Social Welfare Standards, been existing at a below subsistence level since October, 1970.

(4) Plaintiff's affidavit filed in this matter makes it clear that unless benefits are granted immediately she and her family will not be able to purchase the basic necessities of life. There is simply no way to avoid irreparable injury short of granting to her the AFDC benefits to which she is entitled.

Respectfully submitted,

CONTRA COSTA LEGAL

SERVICES FOUNDATION

by: CARMEN L. MASSEY

AFFIDAVIT

*In the United States District Court for the
Northern District of California*

CIVIL ACTION NO. C-702273

[Title omitted in Printing]

AFFIDAVIT

**[IN SUPPORT OF MOTION FOR TEMPORARY
RESTRAINING ORDER]**

I, Joyce Faye Dones, depose and say:

I am married to Edgar Dones. My residence is 3451½ Front Street, Pittsburg, California. We have two children, a boy age three and a girl age four. I am also expecting an additional child to be born the month of January, 1971.

Prior to October, 1970 my husband was present in the home and supporting the family by virtue of his employment at the Fibreboard Corporation in Pittsburg. He earned approximately \$600.00 per month. On or about October the 5th of 1970 my husband was notified that he was to be inducted into the United States Army. He left on October the 7th, 1970 and has been stationed at Fort Ord, California since that time.

At the time of my husband's departure, we had no money in the bank nor any significant amount of property which could be readily sold to provide funds for living expenses. As I was pregnant I was and still am unable to seek and obtain employment. I was therefore left with no funds with which to support the children and myself other than the prospect of an allotment to be paid in connection with my husband's military service. The allotment check did not arrive immediately and I knew it would be at least a month before I could expect one. I therefore applied to the

County of Contra Costa for Welfare Assistance on or about the 9th of October. My application was denied because, as it was explained to me, my husband was considered to be fully-employed and only temporarily absent from the home. Despite the fact that I had no money at the time and did not know when my first allotment check would arrive, the County refused to grant me any benefits other than an authorization for Food Stamps, which, of course, were useless since I had no money for them.

As a result of this I was unable to pay my semi-monthly rental payment in mid-October. I had no money for groceries and finally appealed to the Red Cross which gave me a \$10.00 Food Order around mid-October. On approximately October the 31st, the house we were living in was burned so severely that it was impossible to continue living there. I was then totally without shelter and again had to appeal to the Red Cross. They obtained an apartment for me at a rent of \$42.00 per month and paid the first month's rent. Around the beginning of November they also gave me an additional \$65.00 for groceries and paid my December's rent since my allotment check had still not arrived. Other than that I had no way to obtain food or shelter for myself and the children and was forced to borrow food and beg meals from my grandmother, since neither my parents nor my husband's parents were able to help me. My first allotment check did not arrive until December 18, 1970 and it was only for \$145.00. I have been informed by the Red Cross that I will receive no further retro-active payments from the Army and that \$145.00 is the most I can expect per month.

The apartment in which we were residing prior to my husband's induction rented for \$120.00 per month. I consider the place in which I am residing to be unfit for myself and my family. The water heater and the heater for the

living quarters are unreliable, the plumbing leaks, the doors do not close properly, and the place is very run down and dirty. However, the \$145.00 per month which I expect to continue receiving from the Army is insufficient to allow me to obtain decent living quarters. I have not been and do not expect to be able to provide an adequate diet for my children on the amount I am receiving and my grandmother can no longer assist us with gifts of food. Every cent I have goes for food and rent leaving nothing with which to buy the children needed winter clothing and shoes.

I am being harassed by bill collectors and am in danger of having our car repossessed. If this happens, I will have no way of getting to the doctor and will be without transportation when the time comes for the birth of my baby. On the few dollars the Red Cross has given me and the allotment I am now receiving I have been completely unable to make even interest only payments on the loan contract for the car.

I have been informed by my attorney that the amount I would receive from the County if my application for Welfare Assistance were now approved would be approximately \$73.00 per month. This amount plus the \$145.00 per month allotment I am now receiving would be sufficient, I believe, to allow me to replace the children's clothes that were burned in the fire, make at least interest only payments on our automobile, and go a long way toward purchasing all of the other items necessary for at least a minimally decent standard of living. If I am unable to get this needed assistance, I believe that my financial inability to purchase needed food and clothing for myself and my children, the threatened loss of our car, my inability to obtain proper shelter and nutrition for myself and my unborn child, and the additional repossession of other personal items for

Appendix

which we are indebted, will cause me and my family irreparable physical and economic injury.

Dated: Jan. 6, 1971.

/s/ JOYCE FAYE DONES
JOYCE FAYE DONES

[Notarization omitted in printing]

**ORDER EXTENDING TEMPORARY RESTRAINING ORDER TO
JOYCE FAYE DONES**

*In the United States District Court for the
Northern District of California*

Civil No. C-702273

NANCY REMILLARD, et al.,

vs.

ROBERT MARTIN, et al.,

Plaintiff,

Defendant.

**ORDER EXTENDING TEMPORARY RESTRAINING
ORDER TO JOYCE FAYE DONES**

Good cause appearing, it is ordered that the motion for an order extending the Temporary Restraining Order, previously granted in this case, to Joyce Faye Dones, and her two children, members of the class represented by the named plaintiffs, is granted.

It is further ordered that defendants Robert Martin, Director of the State Department of Social Welfare, and Robert Jornlin, Director of the Contra Costa County Social Services Department are hereby restrained from denying Joyce Faye Dones' application for assistance under the Aid for Families with Dependent Children program on the basis that the absence of her husband Edgar Dones, while in service with the Armed Forces of the United States, does not constitute continuous absence sufficient for a finding of parental deprivation as required under said program.

It is further ordered that good cause being shown, this restraining order shall be continued in full force and effect

Appendix

until the hearing on the motion for a preliminary injunction, filed October 21, 1970, is heard.

Dated: Jan. 20, 1971.

/s/ ALBERT C. WOLLENBERG
Judge, U.S. District Court for
the Northern District of
California

ORDER OF SUBSTITUTION OF PARTY DEFENDANT

*In the United States District Court for the
Northern District of California*

No. C-70 2273 ACW

NANCY REMILLARD, etc., et al.,

Plaintiff,

v.

ROBERT MARTIN, et al.,

Defendants.

**ORDER OF SUBSTITUTION OF
PARTY DEFENDANT**

Whereas Robert Martin has been succeeded in office by Robert B. Carleson as Director of the California State Department of Social Welfare,

It Is Hereby Ordered that Robert B. Carleson, in his official capacity as Director of the California State Department of Social Welfare be, and he is, substituted for Robert Martin as a party defendant in the above-captioned cause and that hereafter, proceedings herein shall be in the name of Robert B. Carleson.

Dated: January 21, 1971.

ALBERT C. WOLLENBERG

Albert C. Wollenberg

United States District Judge

**ANSWER TO COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTION**

*In the United States District Court for the
Northern District of California*

No. C-70 2273 ACW

[Title omitted in Printing]

**ANSWER TO COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTION**

Come now the defendants named herein and for an Answer to the Complaint for Declaratory Judgment and Injunction filed herein, admit, deny and allege as follows:

I

Answering paragraph 1 of the complaint, defendants deny that jurisdiction lies under 28 U.S.C. § 1343(3).

II

Answering paragraph 2 of the complaint, defendants admit that this is a proper case for hearing and determination by a three-judge court pursuant to 28 U.S.C. § 2281. Defendants assume that the "AFDC regulation" to which plaintiffs have reference in the allegations of paragraph 2 of the complaint is California State Department of Social Welfare Regulation section 42-350, and based on that assumption, defendants deny plaintiffs' allegation that said regulation is invalid under the Constitution of the United States; defendants allege that said regulation is valid in all respects and further allege that as to this issue, defendants are entitled to a judgment in their favor as a matter of law.

III

Answering paragraph 3 of the complaint, defendants admit that plaintiffs may *seek* a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 but deny each and every other allegation contained in said paragraph 3.

IV

Defendants admit the allegations contained in paragraphs 4, 7, 8, 9, 10, 11, 13, 15, and 16 of the complaint.

V

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5, 6, and 12 of the complaint.

VI

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the complaint; except that defendants admit the allegations in the fourth, fifth and seventh sentences of paragraph 14 to the extent that the allegations therein recite specific acts committed by either the Contra Costa County Department of Social Services or the California Department of Social Welfare.

VII

Defendants deny each and every allegation contained in paragraphs 17, 19, 21, and 23 of the complaint.

VIII

Answering paragraphs 18, 20 and 22 of the complaint, defendants incorporate by reference their answers to paragraphs 1-16 inclusive of the complaint.

IX

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the complaint, except that defendants deny that plaintiffs are entitled to receive benefits under the AFDC program.

X

Answering paragraph 26 of the complaint, defendants deny that plaintiffs were entitled to receive AFDC payments for the months from December 1969 through November 1970; defendants allege that pursuant to California State Department of Social Welfare Regulation section 42-350, which regulation is valid and legal in all respects, plaintiffs, and each of them, are, and will continue to be, ineligible to receive AFDC benefits for so long as the father of the plaintiff Remillard child (and the fathers of the member children of the class which the plaintiff Remillard child purports to represent herein) remain on active duty in the armed services of the United States.

XI

FIRST AFFIRMATIVE DEFENSE

As a first affirmative defense, defendants allege that plaintiffs have failed to state a claim upon which relief can be granted.

XII

SECOND AFFIRMATIVE DEFENSE

As a second affirmative defense, defendants allege that they are entitled to a judgment in their favor as a matter of law.

WHEREFORE, defendants pray that plaintiffs take nothing by reason of their complaint and that the complaint be dismissed.

Dated: February 1, 1971

EVELLE J. YOUNGER,
Attorney General
of the State of California

/s/ JAY S. LINDERMAN,
Jay S. Linderman
Deputy Attorney General

JOHN B. CLAUSEN,
Contra Costa County
Counsel

PAUL W. BAKER
Deputy County Counsel
Attorneys for Defendants.

[Statement of Service omitted in printing]

On

**MOTION FOR SUMMARY JUDGMENT IN FAVOR
OF DEFENDANTS**

*In the United States District Court for the
Northern District of California*

No. C-70 2273 ACW

[Title omitted in Printing]

**MOTION FOR SUMMARY JUDGMENT
IN FAVOR OF DEFENDANTS**

[Notice of Motion omitted in printing]

Pursuant to Rule 56(b), Federal Rules of Civil Procedure, defendants move the court to enter a summary judgment in defendants' favor dismissing the above-entitled action on the grounds that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment in their favor as a matter of law.

This motion is based upon the pleadings and papers previously filed herein and upon the notice and memorandum of points and authorities in support of this motion, attached hereto.

Dated: January 21, 1971.

EVELLE J. YOUNGER,
Attorney General
of the State of California

/s/ JAY S. LINDERMAN,
Jay S. Linderman
Deputy Attorney General

JOHN B. CLAUSEN,
Contra Costa County
Counsel

PAUL BAKER,
Deputy County Counsel
Attorneys for Defendants.

**MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR SUMMARY JUDGMENT IN
FAVOR OF DEFENDANTS**

*In the United States District Court for the
Northern District of California*

No. C-70 2273 ACW

[Title omitted in Printing]

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS**

The State of California participates (see Welf. & Inst. Code §§ 11200-488) in the federal government's Aid to Families with Dependent Children ("AFDC") program, which was established by the Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. §§ 301-1394). While participation by a state in the AFDC program is voluntary, those states, such as California, which do choose to participate must comply with the requirements of federal law [the Social Security Act and implementing regulations of the U.S. Department of Health, Education and Welfare ("HEW")] in order to be eligible for the receipt of federal funds. *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968).

Under the Social Security Act, provision is made for the granting of assistance to a "dependent child," who is defined in section 406(a) of the Act [42 U.S.C. § 606(a)] as a "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from home, or physical or mental incapacity of a parent, and who is living with" any one of certain specified relatives. In addition, 42 U.S.C. § 601 requires participating states to submit a "State Plan" to the Secretary of HEW for

approval, which plans must provide, pursuant to 42 U.S.C. § 602 (a) (10), "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." This case involves the question of the constitutionality of the provision in the HEW-approved California State Plan that provides that an otherwise "needy" child is ineligible to receive AFDC benefits if the parental absence is "in connection with . . . active duty in the Armed Services." California Department of Social Welfare regulation EAS section 42-350.11.²

Specifically, plaintiffs contend that the California rule (regulation EAS section 42-350.11) declaring a child, whose father is on active military duty, ineligible to receive AFDC benefits is unconstitutional on three accounts: (1) under the Supremacy Clause because in violation of the Social Security Act and HEW regulations, (2) under the Equal Protection Clause of the Fourteenth Amendment and (3) as a denial of due process and privileges and immunities under the Fourteenth Amendment.

It is respectfully submitted that plaintiffs have misread the federal law and misconstrue the basic purposes of the AFDC program with the results that their Supremacy Clause argument is untenable. Moreover, plaintiffs misapprehend the requirements of the Fourteenth Amend-

1. The determination of whether a child is "needy" is made by the State, which is free to set its own standard. *King v. Smith*, *supra*, 392 U.S. at 318 & n. 14. In California "need" is determined pursuant to Department of Social Welfare regulations developed pursuant to Welfare and Institutions Code section 11452. It is important to note, however, that this case does not raise any issues concerning California's "need standards." Plaintiffs do not challenge those standards, nor do defendants deny that the plaintiff Remillard child and other similarly situated children of the purported class represented by her, are "needy."

2. A copy of regulation EAS section 42-350 is attached hereto as Exhibit A.

ment. The California regulation comports with the requirements of the Equal Protection, Due Process, and Privileges and Immunities Clauses thereof.

ARGUMENT

I.

NEITHER THE SOCIAL SECURITY ACT NOR HEW REGULATIONS REQUIRE CALIFORNIA TO TREAT A "MILITARY ORPHAN" AS A "DEPENDENT CHILD" ELIGIBLE TO RECEIVE AFDC BENEFITS.

Plaintiffs Supremacy Clause argument appears to be somewhat of a hybrid assertion of two supposedly established principles: first, that under the Social Security Act and HEW regulations, a child of a serviceman away from home on active duty is a "dependent child" and that the California regulation, providing exactly to the contrary, is in direct conflict with the federal law and therefore is invalid; and second, that the California regulation imposes an eligibility requirement in addition to those set by the federal law and is therefore invalid. See Plaintiffs' Brief in Support of Motion for Preliminary Injunction (hereinafter "Pl. Br.") at 4-7.

At the outset, we should make it clear that there is no dispute as to the proposition "that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to these States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid." *King v. Smith*, 392 U.S. 309, 333 n.34 (1968).

However, plaintiffs seriously overstate the significance of *King v. Smith* when they cite it for the proposition that "the state is not free to impose additional restrictions on

the receipt of AFDC benefits." *Pr. Br.* at 4:1920. Such a proposition is open to serious question in light of the recent Supreme Court decision in *Wyman v. James*, 39 U.S.L.W. 4085 (January 12, 1971). There the Court upheld the New York practice of terminating AFDC benefits upon the recipient's refusal to permit a home visit by the case worker, even though the home visit requirement of the state law was "in addition" to federal requirements. See 39 U.S.L.W. at 4088 & n.6. And see generally, *Comment, "AFDC Eligibility Requirements Unrelated To Need: The Impact of King v. Smith,"* 118 U.Pa.L. Rev. 1219 (1970). However, the point really is academic here since the California regulation neither adds to, nor conflicts with, federal law. This is so for the reason that Congress never intended that a "military orphan" (a child who has a parent absent from the home while on active military duty) be included within the definition of a "dependent child" eligible to receive AFDC.

The Supreme Court has noted the origin and limited purpose of the AFDC program:

"The Social Security Act of 1935 was part of a broad legislative program to counteract the depression. Congress was deeply concerned with the dire straits in which all needy children in the Nation then found themselves. In agreement with the President's Committee on Economic Security, the House Committee Report declared, 'the core of any social plan must be the child.' H.R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). *The AFDC program, however, was not designed to aid all needy children.* The plight of most children was caused simply by the unemployment of their fathers. With respect to these children, Congress planned that 'the work relief program and . . . the revival of private industry' would provide employment for their fathers. S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935). As the Senate Committee Report stated: 'Many of the

children included in relief families present no other problem than that of providing work for the breadwinner of the family. *Ibid.*

The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. *It was designed to protect what the House Report characterized as "[o]ne clearly distinguishable group of children."* H. R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). *This group was composed of children in families without a 'breadwinner,' 'wage earner,' or 'father. . . .'*" *King v. Smith*, 392 U.S. 309, 327-8 (1968) (Footnote omitted and emphasis added.)

Thus, public assistance through AFDC "was intended to provide economic security for children," *Id.* at 329, only in the limited family situation where the expectation of relative economic security inuring to a child from his parent was negated by the death, incapacity, or continued absence [42 U.S.C. § 606 (a)] of the breadwinner. Here, the breadwinner in the Remillard family (and in the other families of the purported class represented by the Remillards) is not dead or incapacitated. While he is "absent" from the home, there is no "continued absence" within the meaning of the Social Security Act to destroy the expectation of the child deriving "economic security" from him rather than the taxpayers.

Indeed, HEW interprets the "continued absence" requirement for "dependency" and AFDC eligibility in a fashion consistent with the above. HEW's interpretation of the continued absence requirement is set forth in Part IV of the Department's "Handbook of Public Assistance Administration," which, in section 3422.2 thereof provides as follows:

"3422. Continued Absence of the Parent From the Home

3422.2 *Interpretation.*—Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances:

1. When the parent is out of the home;
2. When the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support or care of the child. For example: The child's father has left home, without forewarning his family, and the mother really does not know why he left home, nor when or whether he will return. Within this interpretation of continued absence the State agency in developing its policy will find it necessary to give consideration to such situation as a divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, service in the armed forces or other military service, and imprisonment."

It must be noted that the HEW interpretation is a strict one. The absence must be such as "to interrupt or to terminate the parent's functioning as a provider" and the "dura-

tion of the absence precludes counting on the parent's performance of his function." HEW gives as an example of the type situation falling within its interpretation, the case where the father deserts the family and disappears. Thus, HEW treats the "continued absence" situation as something akin to death or incapacity, treating all three situations alike, requiring that dependency of a needy child arises only upon a serious and substantial destruction of the expectation of economic protection being available to a child from his parent.

It is unclear whether plaintiffs are contending that HEW interprets "absence on military duty" as necessarily constituting "continued absence" giving rise to "dependency" and AFDC eligibility. See Pl. Br., 23. However, if they are asserting that, they are wrong. This is clear since in section 3422.2, HEW specifically defers to the states to determine whether as a matter of state policy, service in the armed forces will be treated as "continued absence."³ Under section 3422.4 (see Pl. Br. at 3 for text), federal financial

3. The office of the General Counsel of HEW has informed us that the policy in virtually every state is the same as in California; i.e., to exclude families of absent servicemen from AFDC eligibility. While the exact number of states with this exclusionary policy is not presently available such data can, and will, be collated and submitted at the Court's request.

We argue in this case that the HEW approach is a correct and sound one and that the California regulation not only has HEW's approval but conforms to federal law. Implicit in this, of course, is the notion that the California exclusionary policy, shared by the vast majority, if not all, of the other states, is, in essence *federal policy*. Theoretically then, the proper defendant in this case is the Secretary of HEW rather than the State of California and Contra Costa County.

We have not moved to join the Secretary of HEW as a necessary party under Rule 19 only for the reason that we believe plaintiffs' arguments to be so untenable that a motion under Rule 19 would be an unwarranted additional burden on the Court. If, however, the Court does not share our opinion of the insubstantiality of plaintiffs' claims, it is submitted that before the Court strikes down the California regulation, HEW should be brought into this litigation, either on our motion or by the Court *sua sponte*, to defend the federal policy embodied in the state's regulation.

participation is available if the state includes military-duty absence within its eligibility policy, but HEW requires only that "[w]ithin this interpretation [by HEW] of continued absence the State agency in developing its policy will find it necessary to give consideration to such situation as . . . service in the armed forces or other military service. . . ."

HEW, Handbook, Part IV, section 3422.2, *supra*.

The California regulation comports with Congressional intent and the requirements of the Social Security Act and is in total harmony with HEW regulations. The California regulation is not invalid under the Supremacy Clause.

II

IN DETERMINING "MILITARY ORPHANS" TO BE INELIGIBLE TO RECEIVE AFDC BENEFITS, CALIFORNIA DOES NOT RUN AFOUL OF THE FOURTEENTH AMENDMENT.

A. Equal Protection.

Plaintiffs correctly state that "[t]he effect of California's military service exception is to create two classes of needy families indistinguishable from each other except that one is composed of families in which the father is absent by virtue of his service in the Armed Forces, and the other is composed of families in which paternal absence stems from some other reason." Pl. Br. at 8:3-8. They also correctly assert that unless there is rationality to the classification it must fall in the face of the Equal Protection Clause. This, of course, is axiomatic. *E.g.*, *Dandridge v. Williams*, 397 U.S. 471, 485-6 (1970); *Morey v. Doud*, 354 U.S. 457, 463-4 (1957).

Plaintiffs go on however to make the rather astounding statement that "it is difficult to imagine what basis the state could have for denying assistance to the needy families of absent servicemen when it grants the same assistance

to the needy families of prisoners and deportees." Pl. Br. at 8:16-19. Surely, the patently obvious differences between prisoners and deportees on the one hand and servicemen on the other cannot so completely elude plaintiffs. Remembering that Congress has premised AFDC eligibility on the absence of an expectation of relative economic security insuring from breadwinner to child (*King v. Smith, supra*), the rationality of excluding servicemen's children (but not prisoners' or deportees' children) is obvious. In the case of the serviceman, there simply is not the intra-familial dissociation of the type which emanates from the attendant stigmas of imprisonment or deportation of a father. And of course, the economic implications of imprisonment or deportation differ substantially from military induction or enlistment. An imprisoned father can offer no economic security to his family. And while a deported father may find employment in the country to which he is deported and choose to continue to support his family in this country, the expectation of either contingency occurring is slight. Moreover, there is no effective legal means to compel him to continue to support his family. In contrast, the serviceman suffers nothing approaching the social ostracism of imprisonment or deportation. In addition, he is employed, and extensive military "allotment" procedures exist as a means to "insure" that part of the serviceman-father's pay ends up in the hands of his wife and children. See generally, U.S. Department of Defense "Military Pay and Allowances Entitlement Manual."⁴

The affidavits of Mrs. Remillard and Mrs. Dones which have been filed herein are poignant indictments of both the

4. A copy of the Department of Defense Manual is available in the office of the Judge Advocate General, Sixth Army Headquarters, Presidio of San Francisco. Copies of the pertinent portions of this manual may, and will, be reproduced and submitted if the Court so desires and requests.

military pay scales and the efficiency of the military allotment procedures. However, those inadequacies do not trigger an AFDC eligibility. Plaintiffs' grievances are serious and their complaints are understandable. However, their attacks should more appropriately be on the military establishment rather than on welfare administration.

The problems confronting plaintiffs here are not unlike the predicament in which the plaintiffs found themselves in *Macias v. Richardson*, U.S. Dist. Ct., N.D. Cal., No. 50956. Both groups of plaintiffs present the dilemmas of the "working poor" or "under-unemployed."⁵ In *Macias*, the plaintiffs were challenging the constitutionality of state and federal regulations in the AFDC-U program [the so-called "unemployed father" provisions of the AFDC law (see 42 U.S.C. § 607)] which imposed "arbitrary" cut-off points, in terms of the number of hours worked, in defining which fathers were "unemployed" and which were not. See Exhibit B at 6-7. The court approved the Congressional differentiation between the "unemployed and the under-employed" (Ex. B at 14) and upheld the regulations.

We believe a compelling analogy to the *Macias* case may be drawn here. The California regulation here differentiates between the unemployed, imprisoned father and the under-employed serviceman father, providing for AFDC eligibility of the families of the former, but not the latter. But the dilemmas posed by, and potential solutions to, under-employment are different from those for unemployment. And "[t]he constitution does not require things which are different in fact or opinion to be treated in low as though

5. We have been unable to find any published version of the decision of January 5, 1970, by the three-judge court in the *Macias* case. Therefore, a copy of the Memorandum of Decision is attached hereto as Exhibit B. The decision of the district court has been affirmed by the United States Supreme Court. *Macias v. Richardson*, 39 U.S.L.W. 3214 (U.S. Nov. 16, 1970).

they were the same." *Tigner v. Texas*, 319 U.S. 141, 147 (1940). The AFDC program is not designed to aid families of underemployed "breadwinners" (*King v. Smith, supra*; *Macias v. Richardson, supra*),⁶ and the classifications drawn in the California regulation "are reasonable in light of . . . [the purposes of AFDC]." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

It is submitted that the California regulation satisfies, with ease, the equal protection maxim that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). California's classification scheme excludes plaintiffs from AFDC eligibility when they, and probably many others, think that in fairness that they should not be. However, the Equal Protection Clause is not violated simply because a classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

Nonetheless, plaintiffs urge that the "traditional" equal protection test is inapplicable here and that rather, the more stringent "compelling state interest" test of *Shapiro v. Thompson*, 394 U.S. 618 (1969) must be applied. We submit that plaintiffs' efforts in this regard are so tortured that they must be rejected.

As the first step in plaintiffs' bootstrap argument, they set up a "straw man" by suggesting that one of the reasons

6. Certainly Congress could have included the underemployed within the purview of AFDC. Its failure to do so, however, does not invalidate the entire statutory scheme. Congress, as any legislative body, "may take one step at a time" and "select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). And see, *Developments in the Law: Equal Protection*, 82 Harv. L. Rev. 1065, 1084-87 (1969).

for the California exclusion of "military orphans" from AFDC eligibility "is to discourage service in the military." Pl. Br. at 8:19-20.⁷ They then argue that such a purpose is invalid because it infringes on a "constitutional right" to serve in the military. They suggest that this "right" is to be found in the penumbra of the Constitution along with the "right to travel" in *Shapiro v. Thompson, supra*.

While it is clear that one may look to the Constitution and find a *duty* or "obligation of the citizen to render military service," *The Selective Service Draft Law Cases*, 245 U.S., 366, 375 (1918), one can look only to plaintiffs' imagination, and not to the Constitution or its penumbra, to find a *right* to military service.

However, even if there be a constitutionally protected right to serve in the Armed Forces, that right is not being infringed by the California regulation. Unlike *Shapiro*, where the durational residence requirements imposed upon potential welfare recipients infringed *their* right to travel, here, it is not the "right" of the father to serve his country that is at stake, but rather the claimed right of his dependents to receive AFDC. Thus, a "compelling" state interest need not be shown. Cf. *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 806-808 (1969). *Dandridge v. Williams*, 397 U.S. 471 (1970) involved classifications affecting "the most basic economic needs of impoverished human beings." *Id.* at 485. Yet *Dandridge* applied the traditional "any conceivable state of facts" equal protection test, and the same must be done here. The California regulation passes that test.

7. It must be noted that it is *plaintiffs'* suggestion that the rationale behind the serviceman exclusion is to discourage military duty. In no way does the State of California attempt or suggest that such a rationale does, or constitutionally could, underlie the exclusion.

B. Due Process.

Plaintiffs assert that the California regulation "is a denial of due process in that it embodies a conclusive presumption that a father who is absent from the home due to his military service is not continuously absent from the home, which presumption is arbitrary, capricious, and irrational." Pl. Br. at 12:27-31. Without wishing to appear as semantic gymnasts, we submit that what is wrong with plaintiffs' assertion is that they have neglected to put quotation marks around the two words "continuously absent." Had they done so, "continuous absence" would correctly be denoted as the "words of art" that they are, deriving meaning only within the context in which they are used in the Social Security Act. See 42 U.S.C. § 606(a). In so doing, the "presumption" of non-eligibility of children of servicemen is neither arbitrary and capricious nor irrational. Rather, it is in conformity with the Congressional purposes underlying the AFDC program. *King v. Smith*, 392 U.S. 309 (1968). Plaintiffs, and others, may think the exclusion of servicemen's children from AFDC eligibility to be a manifestation of unsound social policy but the Fourteenth Amendment can no longer be thought to empower federal courts to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). As the Supreme Court stated last term in *Dandridge v. Williams*, *supra*, 397 U.S. at 484-5, "That era long ago passed into history. *Ferguson v. Skrupa*, 372 U.S. 726."

CONCLUSION

California Department of Social Welfare regulation EAS section 42-350 is constitutional. Defendants are entitled, therefore to a judgment in their favor as a matter of law.
Date: February 5, 1971.

Respectfully submitted,

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[Exhibits and Statement of Service omitted in printing]

**MOTION FOR SUMMARY JUDGMENT FOR PLAINTIFFS AND
OPPOSITION TO MOTION FOR SUMMARY
JUDGMENT FOR DEFENDANTS**

*In the United States District Court for the
Northern District of California*

[Title omitted in printing]

No. C-70 2273 ACW

**MOTION FOR SUMMARY JUDGMENT FOR
PLAINTIFFS AND OPPOSITION TO MOTION
FOR SUMMARY JUDGMENT FOR DEFENDANTS**

[Notice of Motion omitted in printing]

Plaintiffs, by their attorneys, and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, move the Court to enter summary judgment for the plaintiffs on the ground that there is no genuine issue as to any material fact, and the plaintiffs are entitled to judgment as a matter of law.

Further, plaintiffs, by their attorneys, oppose the Motion for Summary Judgment for Defendants which has been made by defendants:

This motion and this opposition are based upon the pleadings and papers previously filed herein and upon the Notice and Brief in support of this motion and opposition attached hereto.

Dated: February 11, 1971.

CONTRA COSTA LEGAL SERVICES
FOUNDATION

by: /s/ CARMEN L. MASSEY

Carmen L. Massey

Attorney for Plaintiffs

**BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
FOR PLAINTIFFS AND OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT FOR DEFENDANTS**

*In the United States District Court for the
Northern District of California*

[Title omitted in printing]

No. C-70 2273 ACW

**BRIEF IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT FOR PLAINTIFFS AND OPPOSITION
TO MOTION FOR SUMMARY JUDGMENT
FOR DEFENDANTS**

ISSUE PRESENTED

The following facts are not in dispute in this case:

(1) In order to be eligible for AFDC benefits a child must be both *needy* and *dependent*. (42 U.S.C. 601-609).

(2) Plaintiffs and members of their class are needy individuals as defined by the California Department of Social Welfare Standards of need. (Defendant's Brief: Footnote No. 1).

(3) Plaintiffs and members of their class are currently living separate from their husbands and fathers due to their service in the United States Armed Forces (Affidavits of Nancy Remillard and Joyce Faye Dones; no counter-affidavits filed; Defendant's Answer, paragraph V).

(4) 42 U.S.C. 606 includes within the term "dependent child" one who has been deprived of parental support or care by reason of the "continued absence from the home" of a parent.

(5) Federal participation is available for AFDC grants to Plaintiffs and members of their class. (Defendant's Brief: page 8, lines 1-3).

(6) Plaintiffs and members of their class have been denied and are being denied AFDC benefits solely on the basis of California SDSW Manual-EAS § 42-350.11, which states there is no "continuous absence" where the absence of the parent is due to active duty in the Armed Services. (Defendant's Answer: Paragraph V).

(7) Federal law is controlling in this matter. (Defendant's Brief: Page 1, lines 22-28).

The sole issue to be decided on Plaintiffs' and Defendants' motions for summary judgment is whether § 42-350.11, in light of federal law and the equal protection, due process, and privileges and immunities clauses of the Fourteenth Amendment of the United States Constitution, is invalid and its operation should be enjoined by this Court.

I.

THE SOCIAL SECURITY ACT FORBIDS DENIAL OF AFDC BENEFITS TO NEEDY CHILDREN WHOSE PARENTS ARE ABSENT FROM THE HOME DUE TO MILITARY SERVICE.

One of the statutory requirements is that "aid to families with dependent children . . . shall be furnished with reasonable promptness to all eligible individuals . . ." [42 U.S.C. 602(a)(10)] . . . [42 U.S.C. 606(a)] defines a "dependent child" as one who has been deprived of "parental" support or care by reason of the death, continued absence, or incapacity of a "parent." In combination, these two provisions of the Act clearly require participating States to furnish aid to families with children who have a parent absent from the home; if such families are in other respects eligible. (*King v. Smith*, 392 U.S. 309, 317)

The import of *King v. Smith* is that the federal Act determines the class of individuals to whom the states must grant eligibility; state provisions that have the effect of

narrowing that class, thereby denying eligibility to some whom Congress intended to cover, are to that extent invalid because violative of the requirement of 42 U.S.C. 602(a)(10) that AFDC be provided "to all eligible individuals."

This import has been reflected in several district court opinions. Thus *Doe v. Shapiro*, 302 F. Supp. 761, appeal dismissed 396 U.S. 488 (1970), struck down a state regulation providing for the termination of AFDC to illegitimate children whose mothers refused to disclose the name of their father, holding that "the challenged regulation is invalid on the ground that it imposes an additional condition of eligibility not required by the Social Security Act." 302 F. Supp. 764.

In *Cooper v. Laupheimer*, Civ. No. 69-2421 (E.D. Pa. April 16, 1970) a state regulation provided for recovery of an overpayment by means of a reduction in subsequent grant payments. The Court held that the federal duty imposed by 42 U.S.C. 602(a)(10) is breached if an "otherwise eligible child is deprived of AFDC funds because of parental misconduct." Memorandum Opinion at 13; the regulation was invalid because it was inconsistent with that federal requirement. *id* at 20.

In *Damico v. California*, No. 46538, (N.D. Calif. Sept. 12, 1969) this Court held that California Welfare regulations which stated there was no "continued absence" due to separation unless the applicant had either filed a legal action or the separation had lasted three months were in conflict with 42 U.S.C. 606(a) defining "dependent child" and the primary purposes of the AFDC Program. *Doe v. Hursh*, Civ. No. 4-69-403 (D: Minn. June 30, 1970) is in accord with this decision.

In short, *King v. Smith*; *supra*, not only prohibits states from withholding AFDC to deter illegitimacy or control sexual conduct, but also precludes all eligibility require-

ments unrelated to need, except those explicitly sanctioned by the statute or its legislative history. *Comment, "AFDC Eligibility Requirements Unrelated to Need: The Impact of King v. Smith"* 118 U. Pa. L. Rev. 1219 (1970).

Wyman v. James, 91 S. Ct. 381 (1971) does not, as suggested by Defendant, diminish this reading of *King v. Smith*. *Wyman v. James* discusses only the constitutionality of social worker visits in light of the Fourth and Fourteenth Amendments and concludes that such visits are a reasonable administrative tool for the dispensation of the AFDC program which is designed to provide a "personal, rehabilitative orientation" (*id* at 387) and which has a positive duty to refer to courts or law enforcement agencies any unsuitable home in which an AFDC child is present (*id* at 385), and that such visits do not violate the Fourth and Fourteenth Amendments. *Wyman* does not deal with the denial of benefits to a class of needy and federally eligible children who are denied benefits solely because of the status of their parents, as was the case in *King v. Smith*, *Damico v. California*, *Doe v. Hursh* and this case.

Defendant first contends that "Congress never intended that a 'military orphan' be included within the definition of a 'dependent child' eligible to receive AFDC" (Def. Br., page 4, lines 14-17) and then asserts that "HEW specifically defers to the states to determine whether as a matter of state policy service in the armed services will be treated as 'continued absence' (Def. Br., page 7, lines 26-page 8, line 1) and agrees that "federal financial participation is available if the state includes military duty absence within its eligibility policy." (Def. Br., page 8, lines 2-3). Certainly, HEW could not legally defer to the states the choice as to whether to include a certain class of needy children in the Aid to Families with Dependent Children program if Congress had not intended that such children should be

covered. If "military orphans" were not "dependent children" within the meaning of the Social Security Act, HEW would have no authority to provide federal funds for the payment of AFDC benefits to such children.¹

It is respectfully submitted that Defendant has misread Section 3422.2 of Part IV of HEW's "Handbook of Public Assistance Administration." (set out in Plaintiff's Brief in Support of Motion for Preliminary Injunction: page 2, line 32-page 3, line 20; and Defendant's Brief: page 6, line 7-page 7, line 10). Defendant asserts (Def. Br., page 7, line 25-page 8, line 8) that, by § 3422.2, HEW specifically defers to the states to determine whether as a matter of state policy, service in the armed services will be treated as "continued absence." Plaintiffs contend that a correct reading of § 3422.2 is that state agencies *must* consider these

1. In contrast to Note No. 3 of Defendant's Brief, Plaintiff has secured a copy of a State Survey submitted by Plaintiffs in *Stoddard v. Fisher*, Civil No. 11-168 (S.D. Maine) which indicates:

(1) twenty-two states give aid to all servicemen's families (Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Kansas, Massachusetts, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Virginia);

(2) twenty-one states give no aid to the families of servicemen (Alabama, Arkansas, California, Florida, Georgia, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, Puerto Rico, South Carolina, South Dakota, Texas, West Virginia, Wisconsin, Wyoming);

(3) two states limit aid to families of draftees (Idaho, Maine);

(4) two states limit aid to the families of draftees or enlistees who have enlisted in order to avoid the draft (Iowa, Vermont);

(5) five states did not participate in the survey (Kentucky, Nevada, Tennessee, Utah, Washington). Of these last five states, the Bureau of Social Science Research in Washington, D.C. has submitted to Plaintiff information that Kentucky, Utah and Washington do grant AFDC to Military families. This brings the total number of states that do grant AFDC benefits to military families to twenty-five.

circumstances as constituting "continued absence" where the parents are, in fact, living separately. It should be noted that the wording of the regulation is mandatory: "the State agency in developing its policy *will find it necessary* to give consideration to such situations as . . . service in the armed services or other military service . . ." If the correct interpretation of this regulation were as Defendant urges, surely the wording would be: "the State agency *may* consider . . ."

It is doubtful that Defendant would argue that the States are free to define "continued absence" so as to preclude families separated by divorce, desertion, hospitalization or imprisonment from AFDC benefits. Yet, these situations are put into the same classification as military service in § 3422.2. It is submitted that § 3422.2 does not free the states to make their own interpretation as to what constitutes "continued absence." See *King v. Smith*, *supra*; *Damico v. California*, *supra*.

As Defendant states, (Def. Br., page 5, lines 10-18) the AFDC program was designed to protect that group of children in families without a "breadwinner," "wage earner" or "father." The affidavit of Joyce Faye Dones reveals a family which, prior to October, 1970, did have a "breadwinner." When the federal government ordered Mr. Dones to report for induction, it deprived the Dones family of his earning power and destroyed the economic security of the Dones family. It is ironic that, if Mr. Dones had refused to be inducted and consequently been imprisoned for this criminal act, there is no doubt but that the Dones family would be entitled to AFDC benefits. To punish compliance with the law surely cannot be a permissible goal of the California Welfare Department.

If Plaintiff were to file for a dissolution of her marriage or a legal separation from her husband, her practical cir-

cumstances would not change. She would still receive her allotment and she would still be living separately from her husband. However, she would, with the filing of the legal papers, become eligible for AFDC benefits. That it is violative of the Social Security Act and its purpose of keeping families intact to force such actions on mothers trying to obtain the minimum needs for their children is clear. *Damico v. California*, supra.

In summary, 42 U.S.C. 602(a)(10) requires that all needy dependent children must be granted AFDC benefits if they so apply. The State is not free to eliminate from its AFDC rolls needy children who are federally eligible for AFDC benefits unless specifically authorized to do so by the Social Security Act. (*King v. Smith*, supra.) Children who have a parent continuously absent from the home because of military service are dependent children within the meaning of 42 U.S.C. 606(a). California has violated the Social Security Act by its denial of AFDC benefits to Plaintiffs and members of their class solely on the basis that the absence from the home of a parent due to military service is not "continuous absence" so as to make the family eligible for AFDC benefits.

II.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION FORBIDS DENIAL OF AFDC BENEFITS TO NEEDY CHILDREN WHOSE PARENTS ARE ABSENT FROM THE HOME DUE TO MILITARY SERVICE.

Plaintiffs have already stated in their Brief in Support of Motion for Preliminary Injunction their arguments that 42-350.11 violates the equal protection clause of the Fourteenth Amendment of the United States Constitution:

(1) As there is no rational basis to support the classification of 42-350.11, it must fall as a violation of the equal protection clause;

(2) As the right to serve in the Armed Forces is a fundamental right of United States citizenship, a classification which denies AFDC benefits to families where the absence of a parent is due to his military service, while it grants AFDC benefits to families where the absence of a parent is for other reasons, is unconstitutional unless the state can show a *compelling* interest. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

The case of *Macias v. Finch*, No. 50956 (N.D. Calif), as cited by Defendant, is not relevant to this argument. That case dealt with *intact* families in which the wage earner, although fully employed by state and federal standards, was earning an amount insufficient to meet his family's needs. The *Macias* case dealt with AFDC coverage under 42 U.S.C. 607; it carefully distinguished cases such as this one where Plaintiffs are eligible for AFDC benefits under 42 U.S.C. 606.

Defendant states that, in the case of military families, the husband and father is "employed" and there are legal means to insure that part of his pay ends up in the hands of the family. (Def. Br., page 10, lines 4-8) That is immaterial, as Defendant has already agreed that Plaintiffs are needy, and that their allotments, if any, are insufficient to cover the needs of the family as defined by the California Department of Social Welfare. This case is better compared with the situation where the parents are living separately, either by mutual consent or court order, and the father is working and paying child and spousal support to the family. If the support payments do not meet the standards of need established by the Welfare Department, there is no question but that the family will receive AFDC benefits. In

that situation there are likewise legal means to see that the family receives *some* financial help, but the needy child is not refused AFDC because of this partial support or because of an expectation of support.

Because military service is a right guaranteed to United States citizens, the state may not interfere with that right except for a compelling state reason. Even if military service were not such a right, there is no rational reason to deny AFDC benefits to families where deprivation of a child is due to a parent's absence from the home due to military service, when such benefits are granted to families where deprivation of a child is due to a parent's absence because of divorce, desertion, separation, hospitalization, incarceration or deportation.

III.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION FORBIDS DENIAL OF AFDC BENEFITS TO NEEDY CHILDREN WHOSE PARENTS ARE ABSENT FROM THE HOME DUE TO MILITARY SERVICE.

Any law that clearly impinges upon a fundamental right must be shown to reflect a *compelling* governmental interest or it must fall under the due process clause of the fourteenth amendment. *Shapiro v. Thompson*, *supra*.

The United States Supreme Court has held the above statement of law applies to such diverse rights as: the right to travel [*Shapiro v. Thompson*, *supra*; *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S. Ct. 1659 (1964)]; right to marry [*Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 (1967)]; right to privacy (*Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678); right to educate one's children as one chooses (*Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571); right to study the German language in a

private school (*Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625); right to freely associate with other persons (*NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163).

It is submitted, for the reasons put forth in Plaintiffs Brief in Support of Motion for Preliminary Injunction, that the right to military service is also such a fundamental right and that it cannot be infringed upon by the state in the absence of a compelling reason.

It is further submitted that, where a father is, in fact, continually absent from the home, a state regulation that he is not absent because his absence is due to military service is so arbitrary, capricious and irrational as to fall before the due process clause of the Fourteenth Amendment. The words "continuous absence" as found in the Social Security Act have a very clear meaning. It is the state regulation which has turned them into "words of art" so as to deprive Plaintiffs and the members of their class of the AFDC benefits which are rightfully theirs.

CONCLUSION.

California Department of Social Welfare regulation EAS §42-350 is invalid as violative of the federal Social Security Act and unconstitutional as violative of the equal protection, due process and privileges and immunities clauses of the Fourteenth Amendment of the United States Constitution. Plaintiffs are entitled to a judgment in their favor as a matter of law.

Date: February 11, 1971

Respectfully submitted,

/s/ CARMEN L. MASSEY

CONTRA COSTA LEGAL SERVICES
FOUNDATION

Carmen L. Massey
Attorney for Plaintiffs

AFFIDAVIT OF DONALD F. FONTAINE

Now comes the affiant, being duly sworn, who deposes as follows:

1. During the summer of 1970, a law student employed by Pine Tree Legal Assistance, of which I am the Chief Attorney, undertook a survey of the number of states who provide A.F.D.C. benefits to families of servicemen. That student, whose name is Clifford Goodall, worked under the supervision of Robert Mittel, Esq., and myself;

2. During the months of July August and September of 1970, he sent copies of a questionnaire to attorneys in all 50 states and Puerto Rico and the District of Columbia seeking information about the practices of the Health & Welfare Department in those states with respect to eligibility of families of servicemen for A.F.D.C. benefits; a copy of that questionnaire is attached hereto and made a part hereof;

3. The results of that survey, with changes made because of additional information received since the date of that survey, are as follows:

a. 22 states and the District of Columbia give aid to all servicemen's families—

Arizona
Alaska
Colorado
Connecticut
Delaware
District of Columbia
Hawaii
Illinois
Indiana
Kansas
Massachusetts
Montana

Nebraska
New Jersey
New York
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
Virginia

b. 19 states and Puerto Rico give no aid to the families of servicemen—

Alabama
Arkansas
California
Florida
Georgia
Louisiana
Maryland
Michigan
Minnesota
Mississippi

Missouri
New Hampshire
New Mexico
Puerto Rico
South Carolina
South Dakota
Texas
West Virginia
Wisconsin
Wyoming

c. Two states limit aid to the families of draftees—
Idaho and Maine.

d. Two states limit aid to the families of draftees or enlistees who have enlisted in order to avoid the draft—

Iowa and Vermont

e. 5 states gave no response to the survey—

Kentucky
Nevada
Tennessee
Utah
Washington

DONALD F. FONTAINE, Esq.
Chief Attorney

Subscribed and sworn to before me this 18th day of
February, A.D. 1971.

JUNE BOURGOIN
Justice of the Peace

[Attachments to Affidavit and Statement of Service
omitted in printing]

**OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR
SUMMARY JUDGMENT**

*United States District Court
Northern District of California*

No. C-70 2273 ACW

[Title omitted in printing]

**OPPOSITION TO PLAINTIFFS' CROSS-MOTION
FOR SUMMARY JUDGMENT**

On or about February 11, 1971, plaintiffs filed their notice of motion and (cross-)motion for summary judgment herein. In their brief in support of the motion,¹ plaintiffs assert three major arguments in support of their position that they are entitled to a judgment as a matter of law that California Department of Social Welfare regulation EAS section 42-350.11 is unconstitutional. Those arguments, summarized as we understand them are as follows:

1. Under the Social Security Act and HEW implementing regulations, the child of an active duty serviceman is eligible to receive AFDC benefits and the California regulation is invalid because it narrows that federal eligibility standard.

2. The California regulation is invalid under the Equal Protection Clause because "there is no rational reason" (Pl.S/J Br. at 9:2) for the classification which excludes servicemen's children from AFDC eligibility.

3. The California regulation denies plaintiffs due process of law because it infringes on "their" alleged "right

1. To differentiate it from the original brief filed by plaintiffs, we will refer to plaintiffs' summary judgment brief by means of the citation "Pl. S/J Br."

to military service" (*Id.* at 9:30) without any compelling governmental interest to justify that alleged infringement.

We submit that there is no merit to any of plaintiffs' arguments.

ARGUMENT

I

THE SOCIAL SECURITY ACT DOES NOT REQUIRE THAT "MILITARY ORPHANS" BE GRANTED AFDC BENEFITS AND HEW DEFERS TO STATE POLICY CONCERNING AFDC ELIGIBILITY OF SUCH CHILDREN.

Plaintiffs cite (Pl.S/J Br. at 2-3) *King v. Smith*, 392 U.S. 309, 317 (1968), for the proposition that the Social Security Act establishes federal eligibility requirements and that the states must grant aid to all families who may be eligible under the federal law. We argued in the Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment (at 4-5) that Congress did not intend to include a child of an absent serviceman within the AFDC program. However, even if "military orphans" may be considered as eligible under the Social Security Act, such children do not *have to be* considered eligible by the states. This is the unequivocal conclusion of HEW with respect to defining "continued absence" [42 U.S.C. § 606(a)] of, *e.g.*, a serviceman (HEW, "Handbook of Public Assistance Administration," Part IV, section 3422.2) and in all other instances of eligibility determinations. The view of HEW is that the Social Security Act sets the outer limits of eligibility for which federal contributions are available, but a state is free to draw more constricted parameters around its AFDC program than would be allowable in terms of the availability of federal matching funds. The states, in HEW's

view, are limited in this regard only by what is popularly known as "Condition X"—or the "equitable treatment doctrine." See generally, *Comment, "AFDC Eligibility Requirements Unrelated To Need: The Impact of King v. Smith,"* 118 U.Pa.L. Rev. 1219, 1221-25 (1970).

An excellent presentation by HEW of its views in this regard was made in a brief filed in the case of *Barksdale v. Shea*, U.S.D.C., D. Colo., Civil Action No. C-1967. We have reproduced a copy of that brief and it is attached hereto as Exhibit A. In that case, welfare recipients alleged that the Colorado law which imposes a "more restrictive" age requirement for AFDC eligibility than does the Social Security Act is invalid under 42 U.S.C. § 602(a)(10). That section requires "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." And, of course, it is the section on which plaintiffs here rely as a basis for their contention that the California regulation in question is invalid because allegedly "more restrictive" than the Social Security Act.

Our information is that no decision has yet been rendered in that Colorado case. However, the HEW position of deferring to the state's determination of eligibility has been upheld in a similar case in Illinois. *Alexander v. Swank*, F. Supp., (April 30, 1970), CCH, Pov. L. Rep. ¶ 11426, *prob. juris. noted*, 39 U.S.L.W. (U.S. February 22, 1971). And see, *McClellan v. Shapiro*, 315 F.Supp. 484 (D. Conn. 1970).

Moreover, despite plaintiffs' attempted distinguishing (Pl.S/J Br. at 4:4-18) of *Wyman v. James*, U.S., 91 S.Ct. 381 (1971), we submit that necessarily implicit in that decision is the determination by the Supreme Court that the states are free to impose reasonable eligibility restrictions that are "in addition" to federal eligibility criteria. In *Wyman*, the plaintiff class of AFDC children

were receiving AFDC benefits and presumably were in all respects "needy" and "dependent" children—at least as far as federal eligibility criteria were concerned. However, New York State imposed a "home visit" requirement as a condition of continued receipt of AFDC benefits. There is no such requirement in the federal law. See 91 S.Ct. at 387 & n.6. The Supreme Court nonetheless upheld the New York statute. Thus, the practical effect of the decision is that children in New York who are eligible, from the viewpoint of the federal government, may be denied AFDC benefits because their mothers choose not to allow a home visit by the caseworker as required by New York. By a parity of reasoning, California may exclude servicemen's children from AFDC eligibility even though, from the federal viewpoint, it might be equally permissible for California not to exclude them. In other words, as long as the State determination is reasonable—which surely the California regulation in question is—that classification need not be co-extensive with federal eligibility standards.

II

THE CALIFORNIA REGULATION COMPLIES WITH THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT.

Plaintiffs reiterate their allegation that the California regulation violates the Equal Protection Clause. PLS/J Br. at 7-8. However, we do not believe that they have adduced anything new that lends any merit to their insubstantial claim. One point of plaintiffs warrants comment however. They argue as follows:

"Defendant states that, in the case of military families, the husband and father is 'employed' and there are legal means to insure that part of his pay ends up in the hands of the family. (Def.Br., page 10,

lines 4-18) That is immaterial, as Defendant has already agreed that Plaintiffs are needy, and that their allotments, if any, are insufficient to cover the needs of the family as defined by the California Department of Social Welfare." PLS/J Br. at 8:12-18.

This statement appears to evidence a notion on plaintiffs' part that simply because they are needy, they must be paid AFDC. Of course, that is a terribly mistaken notion, since one must be both needy *and* dependent. Plaintiffs satisfy the need criterion but they are not "dependent." California determines that a serviceman is not an absent parent, or to put it conversely, the serviceman father is deemed to be "present." Thus, even though the father's support may be insufficient to meet the family needs, his "presence" renders the child ineligible for assistance. Cf. *King v. Smith*, 392 U.S. 309, 329 (1968).

Plaintiffs "new" due process argument consists of a citation of seven Supreme Court cases (PLS/J Br. at 9:17-27) in support of the proposition that a law is invalid if it impinges on any of a variety of fundamental rights. We have no dispute with plaintiffs over these cases other than that citation of them is totally inapposite to the case at hand. This is so for the simple reason that there is no fundamental constitutional right at issue in this case. No such sanctity attaches to either the "right to welfare" or the "right to military service" even assuming that there is a right, of any kind, to either. Moreover, there are no rights which are illegally infringed by operation of California Department of Social Welfare regulation EAS section 42-350.11.

Dated: February 25, 1971.

EVELLE J. YOUNGER, Attorney
General of the State of
California

/s/ JAY S. LINDERMAN,
Jay S. Linderman

Deputy Attorney General

JOHN B. CLAUSEN, Contra
Costa County Counsel

PAUL W. BAKER, Deputy
County Counsel

Attorneys for Defendants.

[Exhibit and Statement of Service omitted in printing]

**ORDER GRANTING DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF AND
DISSENTING OPINION OF JUDGE CONTI ATTACHED**

*In the United States District Court for the
Northern District of California*

CASE NO. C-70 2273 ACW

NANCY REMILLARD, etc., et al.

Plaintiffs,

VS.

ROBERT B. CARLESON, et al.

Defendants.

**ORDER GRANTING DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF
AND DISSENTING OPINION OF JUDGE
CONTI ATTACHED**

[The majority and dissenting Opinions Below are printed
in the Appendix to the Jurisdictional Statement at pages
A1 and A7, respectively]

**STAY OF EXECUTION OF ORDER GRANTING
INJUNCTIVE RELIEF**

*In the United States District Court for the
Northern District of California*

CASE NO. C-70 2273 ACW

NANCY REMILLARD, etc., et al.

Plaintiffs,

vs.

ROBERT B. CARLESON, et al.

Defendants.

**STAY OF EXECUTION OF ORDER
GRANTING INJUNCTIVE RELIEF.**

[A copy of the District Court stay-Order is printed in the Appendix to the Jurisdictional Statement at page A18. That Order was vacated by Mr. Justice Douglas by Order dated August 3, 1971. Appellants' Motion to Reinstate Stay was denied by the Supreme Court of the United States by Order dated October 12, 1971.]

**NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES**

*In the United States District Court for the
Northern District of California*

CASE NO. C-70 2273 ACW

NANCY REMILLARD, etc., et al.

Plaintiffs,

vs.

ROBERT B. CARLESON, etc., et al.

Defendants.

**NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES**

[The Notice of Appeal to the Supreme Court of the United States is printed in the Appendix to the Jurisdictional Statement at page A20.]